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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CLEVELAND JOHNSON et al., Defendants and Appellants.	2d Crim. No. B200472 (Super. Ct. No. BA315443) (Los Angeles County)

Cleveland Johnson and Stanley Barger appeal a judgment following their convictions for sale of a controlled substance, cocaine (Health & Saf. Code, § 11352, subd. (a)) and possession for sale of cocaine base (*id.*, § 11351.5). We conclude that the trial court properly denied a *Wheeler*/*Batson* motion, that it did not abuse its discretion in its rulings on a *Pitchess* motion, and that substantial evidence supports Barger's conviction for possession for sale of cocaine base. We affirm.

FACTS

Police Detective Chris Luna was an experienced plain clothes narcotics officer working in the “skid row” area of Los Angeles. He testified that in the area near Sixth and San Julian streets, drug sales are common and occur "out in the open." The most common variety of rock cocaine sold there is called "a chip," which costs $5. He said drug dealers often use a "middleman" who confers with buyers, finds out what they

want, takes their money, obtains the drugs from the dealer, and then delivers the drugs to the buyer.

Late one afternoon, Luna was conducting a surveillance operation. He observed Johnson sitting on a sidewalk. Barger was standing five or six feet away from Johnson. They "appeared to be talking with one another."

A man named Hector Sirin approached Barger and spoke "briefly" with him. Sirin handed Barger a $5 bill. Barger handed the bill to Johnson. Johnson "selected a small off-white solid that resembled rock cocaine" and gave it to Barger. Barger then handed it to Sirin. Sirin walked away.

The police promptly arrested Sirin. They found "an off-white solid" substance near where he was standing at the time of his arrest. Testing confirmed that the substance was 0.04 grams of cocaine base.

Police Officer John Armando testified that, as he approached the scene, Johnson dropped an "off-white solid." Testing confirmed that the substance Johnson dropped was cocaine base.

In the defense case, Barger testified that he did not know Johnson and he was not selling drugs. He did not take money from Sirin and never gave him any narcotics.

DISCUSSION

I. *The Wheeler/Batson Motion*

Barger and Johnson contend that the prosecutor exercised peremptory challenges to remove two African-Americans from the jury, and the trial court erred by not granting their *Wheeler*/*Batson* motion. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.) We disagree.

"Under *Wheeler* and *Batson*, if a party believes his opponent is improperly using peremptory challenges for a discriminatory purpose, he must raise a timely challenge and make a prima facie case of such discrimination. Once a prima facie case has been shown, the burden shifts to the other party to come forward with an explanation

that demonstrates a neutral explanation related to the particular case . . . ." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216.) The prosecutor must articulate valid non-discriminatory reasons for the peremptory challenges. He or she may not rely on "sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Barber* (1988) 200 Cal.App.3d 378, 396.)

"A prosecutor is presumed to employ peremptory challenges in a constitutional manner, and we defer to the trial court's ability to assess the prosecutor's rationale for excusal in order to distinguish 'bona fide reasons from sham excuses.'" (*People v. Salcido* (2008) 44 Cal.4th 93, 136-137.) "We also defer to the trial court's conclusions in ruling on the motion, so long as the court makes 'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.'" (*Id*. at p. 137.)

A. *Prospective Juror No. 16*

Johnson and Barger note that the prosecutor exercised a peremptory challenge to prospective juror No. 16, an African-American film maker who said she could be "impartial." They claim the trial court erred by ruling that the prosecutor's peremptory challenge was for a neutral reason. They contend the prosecutor gave sham justifications and was motivated by group bias.

But Johnson and Barger have not shown that the trial court erred. The prosecutor gave several reasons for the peremptory challenge, including: 1) the prospective juror had extensive knowledge about the area where the arrests took place, 2) she made a film about how the police had mistreated a person who was arrested in that area, and 3) she had expressed strong "emotions" which indicated a potential bias against the prosecution.

The court ruled that the prosecutor's reasons for challenging No. 16 were legitimate and "race-neutral." It found that No. 16 had "unique knowledge" about the "area" and "the officers involved in the case."

Prospective juror No. 16 testified that she was a documentary film maker who was familiar with skid row. She was making a film about the area focusing on "the

police, the homeless, the drug addicts, the dealers . . ." She knew some of the law enforcement witnesses in this case. She also said she had strong feelings about how the police treated a person in her film. She said, "the particular person that is in my documentary was unfairly arrested and was accused of something . . . unfairly and he was *treated very badly and I documented it.* He was released and he spent . . . his time behind bars. *So do I have emotion or feelings of bias, I can't help but, you know, have feelings.*" (Italics added.)

From her testimony the trial court could reasonably find that the prosecutor's reasons for excusing her were neutral and not based on group bias. The prosecution was justifiably concerned about No. 16's ability to be objective or impartial. (*People v. Watson* (2008) 43 Cal.4th 652, 677.) She had a strong emotional interest involving a person she felt the police had wrongfully arrested. She had extensive knowledge about the area where the arrests of the current defendants occurred.

B. *Prospective Juror No. 10*

Johnson and Barger note that the prosecutor also exercised a peremptory challenge to prospective juror No. 10, an African-American. They claim the court erred because it found the prosecutor had "a legitimate reason" to excuse her. They argue that it should have found that the prosecutor's "peremptory challenge was racially motivated." We disagree.

The prosecutor was an Asian-American. Johnson's counsel questioned prospective juror No. 12, an Asian-American who mentioned her bias against African-Americans.

During the questioning of No. 12, the prosecutor watched the reaction of prospective juror No. 10, an African-American who was visibly upset by what No. 12 was saying. The prosecutor explained why she exercised the peremptory challenge to No. 10. She said, "I noticed that number 10 was looking at me from time to time. And her behavior, she folded her arms towards the front. And my reaction was she was not looking too favorably upon me as well. And that's my concern."

The court asked the prosecutor, "and you feel the looks you got from this prospective juror, that she will hold juror number 12's answers against you?" The prosecutor: "That's my sense, Your Honor." The court found the challenge "was made for a race-neutral reason."

Johnson and Barger have not shown error. The trial court could reasonably find that the prosecutor showed a valid reason for the challenge. "It is well settled that '[p]eremptory challenges based on counsel's personal observations are not improper.'" (*People v. Reynoso* (2003) 31 Cal.4th 903, 917.) A smile or a glare may indicate as much about a juror's attitude as a verbal response. (*Ibid.*) A prospective juror's negative body language directed against counsel is a valid race-neutral reason for a peremptory challenge. (*Ibid.*; *People v. Allen* (2004) 115 Cal.App.4th 542, 547; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1053.) No. 10 was angry about No. 12's racism. But she also visibly directed that anger against the prosecutor, who was of the same ethnicity as No. 12. Such a bias against the prosecutor constitutes a valid justification for a peremptory challenge and a neutral reason for excusing this prospective juror.

II. *The Pitchess Motion*

Johnson and Barger request that we make an in camera review of the trial court's proceedings on Johnson's *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) A *Pitchess* motion is a procedure for "screening law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225.)

The trial court ruled that Johnson's *Pitchess* motion demonstrated that there might be evidence of claims against Officers Luna and Armando alleging falsification of evidence or dishonesty. It conducted an in camera review of reports of incidents relating to these allegations. The court subsequently ordered records of three "incidents" involving Armando and seven "incidents" involving Luna to be disclosed to the defense.

For adequate appellate review, the trial court must make a record of the documents it considered. (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1229.) It may do this

by attaching them to the confidential reporter's transcript, or by describing the contents of the documents it reviewed. (*Ibid.*) Here the court selected the latter alternative. It followed the required procedure of having the custodian of records sworn to answer questions about the records in the in camera hearing. (*Ibid.*)

As to Armando, there were three complaints falling within the category of allegations of dishonesty or falsification. All three were disclosed to the defense. For Luna, there were eight complaints falling within this category and seven were disclosed to the defense. The trial court described the undisclosed complaint to be a conclusory allegation leveled at a number of officers, including Luna. It did not contain facts or details, and the court found the document to be unclear. Given the trial court's description about this ambiguous document, we cannot find an abuse of discretion in its decision not to disclose it.

But even so, as the Attorney General correctly notes, Johnson and Barger are not entitled to a reversal for *Pitchess* error unless they can show prejudice. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 418; *People v. Memro* (1985) 38 Cal.3d 658, 684.) Here they have not made such a showing. The trial court disclosed 10 complaints involving alleged dishonesty or falsification of evidence. But, in the defense case, none of the individuals who made these complaints were called as witnesses. No documentary evidence about these complaints was introduced. When Armando was cross-examined, neither Barger's nor Johnson's trial counsel asked him a single question about any of the complaints. The jury did not find Barger to be credible, and the defense was not successful in impeaching the credibility of the police officers who testified. Given the strength of the prosecution's case, we conclude that any *Pitchess* error would not be prejudicial.

III. *Substantial Evidence*

Barger contends there was insufficient evidence to support his conviction of possession of cocaine base for sale. We disagree.

In reviewing the sufficiency of the evidence, we draw all reasonable inferences in support of the judgment. We do not weigh the evidence or decide the credibility of witnesses. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10-12.) Health and Safety Code section 11351.5 provides, in relevant part, that "every person who possesses for sale . . . cocaine base . . . shall be punished by imprisonment in the state prison . . . ." "Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746.) The crime "can be established by circumstantial evidence and any reasonable inferences drawn from that evidence." (*Id*. at p. 1746.)

Here Luna testified that Barger "facilitated" the drug transaction as the "middleman between Sirin and Johnson." Barger "received the money, gave it to Johnson, took the narcotics and then gave it back to Sirin." Luna said Barger "was equally working in a process to sell narcotics." He described the use of a middleman on the streets as a common method drug dealers use to sell narcotics. The middleman talks with the buyers, finds out what they want, takes the money for the sale, obtains the narcotics from the dealer, and then delivers it to the buyer. From Luna's testimony, a trier of fact could reasonably infer that Barger was a middleman for Johnson.

Barger contends that Luna's testimony is insufficient because when he was arrested he possessed "no packaging materials, no scales, no pay owe sheets, no large quantity of drugs, and no large quantities of cash." But this case involves the sale of drugs by street dealers. Luna testified that "it's common to have individuals that are involved in the sales to not have any currency or narcotics on them at the time of arrest." He said "typically" the "middlemen" do not have such items with them. Luna knew this based on his experience of interviewing "sellers that have been arrested in the capacity of middlemen . . . ."

Barger claims that Luna's opinion was tantamount to nothing more than "an argument to the jury." But Luna was not merely an expert discussing a hypothetical.

He was an experienced narcotics officer who was an eyewitness to this narcotics transaction. Such expert testimony is properly admitted as evidence supporting a conviction for the offense of possession for sale. (*People v. Meza*, *supra*, 38 Cal.App.4th at p. 1746.) The evidence is sufficient.

The judgments are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

David S. Wesley, Judge

Superior Court County of Los Angeles

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